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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ANTHONY C. KOVIC,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

DAVID P. SCHIPPERS
DONALD B. MACKAY

Attorneys for Petitioner

OF COUNSEL:

SCHIPPERS & MACKAY, CHARTERED
79 West Monroe Street
Suite 400
Chicago, Illinois 60603
(312) 263-1200

QUESTIONS PRESENTED

I. WHETHER DUE PROCESS MANDATES THAT THE REASONABLE DOUBT STANDARD BE APPLIED IN DETERMINING A DEFENDANT'S PARTICIPATION IN A CONSPIRACY.

II. WHETHER A MASS TRIAL, INVOLVING THE SINGLE PROSECUTION OF SEVENTY-TWO COUNTS AND NINE DEFENDANTS, VIOLATES FIFTH AMENDMENT DUE PROCESS OF A DEFENDANT WHO IS JOINED EXCLUSIVELY ON THE BASIS OF A SIMILAR MODUS OPERANDI AND THE EXISTENCE OF A COMMON PARTICIPANT IN SEPARATE SCHEMES.

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PRAYER

The Petitioner, Anthony C. Kovic, respectfully prays that a Writ of Certiorari issue to review the Judgment and Order entered by the United States Court of Appeals for the Seventh Circuit on September 7, 1982, affirm-

ing Petitioner's conviction in the United States District Court for the Northern District of Illinois, Eastern Division; and the Order entered by the United States Court of Appeals for the Seventh Circuit on October 25, 1982 denying the Petition for Rehearing herein.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit, not yet reported, affirming the judgment of conviction below, is attached hereto and appears as Appendix A. The Order of the United States Court of Appeals for the Seventh Circuit denying the Petition for Rehearing herein, is attached hereto and appears as Appendix B.

STATEMENT OF JURISDICTION

The Petitioner, Anthony C. Kovic, appealed his conviction in the United States District Court for the Northern District of Illinois, Eastern Division to the United States Court of Appeals for the Seventh Circuit. On September 7, 1982, the United States Court of Appeals for the Seventh Circuit affirmed the judgment of conviction. A timely Petition for Rehearing was denied by the Seventh Circuit Court of Appeals on October 25, 1982.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. 1254(1) and Rule 17(1)(a) and (c) of the Rules of this Court.

This Petition for a Writ of Certiorari has been filed within the time permitted by law after the denial of the Petition for Rehearing by the Seventh Circuit Court of Appeals.

CONSTITUTIONAL PROVISION INVOLVED

Amendment V of the Constitution of the United States provides:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATUTORY PROVISIONS INVOLVED

Title 18, Section 1951, United States Code states:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any

person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twelve years, or both.

(b) As used in this section --

(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52,

101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

Title 18, Section 1341, United States Code, states:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years or both.

STATEMENT OF THE CASE

Petitioner, Anthony C. Kovic, was charged in eighteen counts of a seventy-two count indictment. He was charged with two distinct offenses: (1) knowingly and willfully, together with several co-defendants, having used the mails in furtherance of a scheme and artifice to defraud, in violation of Title 18, U.S.C., Section 1341 (Counts One through Seventeen); and (2) knowingly and willfully affecting and attempting to affect commerce, and the movement of articles and commodities in commerce, by extortion under color of official right, in violation of Title 18, U.S.C., Section 1951 (Count Thirty).

After a trial by jury, on February 26, 1981, the Defendant was found guilty as to all counts in the indictment in which he was named; and judgment was entered on the verdict.

The Defendant was committed to the custody of the Attorney General for a period of twenty years on Count Thirty; and for a

term of five years on each of Counts One through Seventeen, both inclusive. The sentences on Counts One through Four were to run consecutively; on Counts Five through Eight were to run consecutively; on Counts Nine through Twelve were to run consecutively; and on Counts Thirteen through Sixteen were to run consecutively. With that exception, all other counts were to run concurrently with the sentence imposed on Count Thirty, and with sentences previously imposed by Judge Bernard Decker in Cause Number 80 CR 262. In addition, the Defendant was fined a total sum of twenty-seven thousand dollars.

The Seventh Circuit Court of Appeals entered an Order on September 7, 1982, affirming the conviction and judgment of the District Court; and on October 25, 1982, the Court of Appeals denied a Petition for Rehearing.

On Mr. Kovic's Motion, the Court of Appeals issued its Order staying the mandate and gave this Petitioner until December 23,

1982 to file his Petition for Writ of Certiorari in this Honorable Court.

The Defendant, Anthony C. Kovic, was, during the relevant period, Chief of the Electronics and Motor Maintenance Division of the Chicago Police Department; though, in that capacity, he was only a civilian employee. The division headed by the Defendant was responsible for the purchase and maintenance of all electronic equipment and squad cars for the Chicago Police Department.

It was impossible for the police garages and personnel to handle all of the repair work for the police vehicles, so yearly contracts were awarded to various automobile vendors who would thereby become responsible for performing that service. The City of Chicago was divided into four separate areas and each area had a police garage assigned to it. The main garage and headquarters of the Motor Maintenance Division was located at 51st Street and South Wentworth Avenue.

When bids were awarded for motor maintenance and repairs, a primary and secondary vendor would be selected for each of the four sections; but, as a practical matter, almost all of the repairs for a given section would be performed by the primary vendor. The secondary vendor would receive work only when the primary vendor was unable or unwilling to perform services on police vehicles.

Shortly after Richard Nawrocki and his partner, Ron Cavale, went into the automobile repair business under the name of Mar-Lin Automotive, Nawrocki asked Miles Coleman, a Chicago Police road machinist, to arrange a meeting with Chief Anthony Kovic to discuss the possibility of procuring repair work on police vehicles. The meeting took place in the Spring of 1976, and was attended by Kovic, Nawrocki, Coleman and Cavale. During the initial conversation, Kovic asked Nawrocki if the operation would be run "straight up". When assured that it would, Kovic told the

two businessmen that he would assist them; but if he ever heard that they had been talking about the meeting with Kovic, he would squash the contract in a minute and deny ever having talked to them.

In late April 1976, Mar-Lin, with the assistance of Coleman, filed a bid to do the work on City owned vehicles. Shortly thereafter, Coleman called to tell Nawrocki that the bid was too high. At that time, Coleman offered to furnish a copy of a vendor letter to show Nawrocki how he should go about lowering his bid. Later Nawrocki received a copy of the letter from Coleman, drafted a similar letter reducing his bid and sent it in.

Shortly after the primary contract for the southwest side of Chicago was awarded to Mar-Lin, Coleman came to the garage and arranged with Nawrocki to furnish Mar-Lin spurious work orders for nonexistent work, with the understanding that Coleman and

Nawrocki would split the resulting payments.

Toward the end of July 1976, Nawrocki asked Coleman why there had been so little work received by his firm, and was told that Kovic wanted to make sure he was a good payer first. Thereafter, Nawrocki began payoffs to Coleman and continued through August 1979. Payoffs generally ranged from two thousand to seven thousand dollars a month, depending on how much spurious mechanical work had been charged.

In or about September 1976, Anthony Pesha, another policeman assigned as an accident adjuster, approached Nawrocki at Coleman's suggestion and arranged to inflate accident estimates and split the inflated amount fifty-fifty. Pesha eventually collected between two thousand and five thousand dollars per month until August 1979. At one time or another, both Pesha and Coleman told Nawrocki that they were splitting their payoffs with Kovic.

In mid-April 1978, the Defendant Kovic

called Nawrocki at Mar-Lin and told him to come to his office immediately. When Nawrocki arrived, he was told by Kovic that another dealer was interested in coming into the southwest side and Kovic was getting pressure from downtown. Kovic said that he and his associates could get a better piece of the action. Kovic thereupon demanded ten percent of all future gross billing on the police automobile repair which he, Kovic, was going to split with "people downtown". Kovic arranged to meet Nawrocki the next morning at Mar-Lin, at which time Nawrocki agreed to pay. When Nawrocki indicated a desire for more work, Kovic told him that he would talk to Pesha and straighten it out. Because he said that he did not want Nawrocki to get hurt, Kovic authorized him to add ten percent to every order. When Nawrocki asked Kovic "who is going to add the ten percent on", Kovic answered that he would make "these guys add it on". When Nawrocki asked why the others would want to go along if there was no money

in it for them, Kovic said "I'll tell them to".

Thereupon, Kovic made it a practice to pick up money very early in the morning. The day before each pick up he would call Nawrocki and inform him of the amount he expected merely by calling out numbers. Nawrocki would then procure cash to cover the payment, meet Kovic and pay him off.

Several days after Kovic's first visit in April 1978, Pesha stopped by and asked what was happening. Pesha told Nawrocki that Kovic was trying to get the whole payout and not allow any money for the other officers. When informed of Nawrocki's new deal with Kovic, Pesha told Nawrocki he would not add on any ten percent to the billing unless he was getting some of the money.

In about April 1978, Miles Coleman also came to see Nawrocki and told him "the Chief told me to cut down on writing paper". He too said that he would not put "my neck in the noose

for nobody if I ain't getting nothing out of it." Coleman asked if there was a way they could work out a deal, and suggested he would continue to write spurious billing, if he could get half of what his take would have been under the old arrangement. Coleman and Nawrocki finally agreed that Coleman would receive two thousand a month thereafter.

The only direct evidence of Mr. Kovic's participation in any scheme to defraud involving Coleman, Pesha and Cavale was the testimony of the witness Nawrocki concerning conversations with either Mr. Coleman or Mr. Pesha in which they are alleged to have told Nawrocki that Mr. Kovic was involved in some manner. The Defendant, relying upon this Court's opinions in Kotteakos v. United States, 328 U.S. 750 (1946) and in Blumenthal v. United States, 332 U.S. 539 (1947), objected to the admission of the hearsay statements of alleged co-conspirators on the grounds that there was insufficient independent evidence connecting this Defendant with the conspiracy. The court, though,

applying the preponderance of the evidence test announced by the Seventh Circuit Court of Appeals in United States v. Santiago, 582 F.2d 1128 (7th Cir. 1978), admitted hearsay statements pursuant to Rule 801(d)(2)(E) of the Federal Rules of Evidence.

In addition, the Defendant moved for a severance from his co-defendants pursuant both to Rule 8(b) and Rule 14 of the Federal Rules of Criminal Procedure. Both the trial court and the Seventh Circuit Court of Appeals relied upon the similarity of the criminal activity charged against Mr. Kovic and his co-defendants, the similarity in the modus operandi of the various parties and the fact that there was a common victim in determining that there was in fact no Rule 8(b) joinder. Furthermore, the court found that there was sufficient common evidence to justify a joinder of all defendants in a mass trial without any violation of Rule 14.

REASONS FOR GRANTING THE WRIT

I. DUE PROCESS REQUIRES THAT THE REASONABLE DOUBT STANDARD BE APPLIED IN DETERMINING A DEFENDANT'S PARTICIPATION IN A CONSPIRACY.

In 1970 this Court explicitly held:

> The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

In Re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970). Thus, proof of a criminal charge beyond a reasonable doubt is constitutionally mandated. This requirement is premised on "[A] fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." Winship, 397 U.S. at 372, 90 S.Ct. at 1077 (Harlan, J., concurring).

In fact, long before Winship, this Court articulated the fundamental fairness requirements of due process to mean that "No man should be deprived of his life under the forms of law unless the jurors who try him are able,

upon their consciences, to say that the evidence before them . . . is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged." Davis v. United States, 160 U.S. 469, 484, 493, 16 S.Ct. 353, 357, 360 (1895).

The District Court and the Court of Appeals, in the case at bar, have totally emasculated this hallowed and long standing rule of law by sanctioning this Petitioner's inclusion in a mail fraud scheme applying a simple preponderance of the evidence standard of proof. Fundamental fairness, as embodied in the Due Process Clause, requires a more stringent standard in criminal trials than in ordinary civil litigation. Winship, 397 U.S. at 372, 90 S.Ct. at 1068. By erroneously equating the admissibility rule announced in United States v. Santiago, 582 F.2d 1128, 1133 (7th Cir. 1978) with the quantum of proof required for a criminal conviction, the courts below are in direct conflict with principles

announced by this Court. A passage from Weinstein's Evidence cited with approval by the Seventh Circuit in Santiago, concludes:

> Only if the Court is itself convinced beyond a reasonable doubt -- considering hearsay as well as non-hearsay evidence -- of the conspiracy, defendant's membership, and that the statement was made in furtherance thereof, should it admit. 1 Weinstein's Evidence, § 104(05) at 104-44, 582 F.2d at 1133.

The holding of Santiago to the effect that the less stringent civil standard (preponderance) is sufficient to prove a defendant's membership in a scheme or conspiracy for purposes of admitting hearsay declarations of alleged co-schemers is directly in conflict with the repeated holdings of this Court that proof beyond a reasonable doubt is required as to every fact necessary to constitute the crime charged.

The offenses for which this Petitioner was convicted are specific intent crimes requiring proof of the elements of knowingly and willfully having engaged in certain

conduct. United States v. Diggs, 613 F.2d 988, 997 (D.C. Cir. 1979). Admitting hearsay declarations of co-schemers on the basis of a preponderance standard created a conclusive presumption of criminal intent which effectively eliminated the mens rea as an ingredient of the offenses charged.

This Court has explicitly condemned the use of conclusive presumptions going to issues of intent. Mullaney v. Wilbur, 421 U.S. 684 (1975); Patterson v. New York, 432 U.S. 197 (1977); and Sanstrom v. Montana, 422 U.S. 510 (1979).

The most compelling reason for granting the Writ here is this Court's thoughtful and incisive observation in Winship:

> Moreover, use of the reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government

> cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

397 U.S. at 364, 90 S.Ct. at 1072, 1073.

II. A MASS TRIAL INVOLVING THE SINGLE PROSECUTION OF SEVENTY-TWO COUNTS AND NINE DEFENDANTS VIOLATES FIFTH AMENDMENT DUE PROCESS OF A DEFENDANT WHO IS JOINED EXCLUSIVELY ON THE BASIS OF A SIMILAR MODUS OPERANDI AND THE EXISTENCE OF A COMMON PARTICIPANT IN SEPARATE SCHEMES.

To sanction the actions of the District Court and the Court of Appeals here does violence to the well settled law that multiple defendants may be joined in a single prosecution only when they participated in the same act or transaction, or in the same series of acts or transactions. Kotteakos v. United States, 328 U.S. 750, 773, 66 S.Ct. 1239, 1252 (1946). In this case, no defendant was named in every count and no single conspiracy, joint venture or scheme was charged. The only factor tending to link all of the charges was that they all involved, in one way or another, and at one time or another, a common participant, either as the victim or co-schemer. For a proper

joinder, the common activity must constitute a substantial portion of the proof of the joint charges. United States v. Roselli, 432 F.2d 879, 899 (9th Cir. 1970); United States v. Kahn, 381 F.2d 824, 838 (7th Cir. 1967).

If the decision below is allowed to stand unreviewed by this Court, it will constitute an open invitation to prosecutors nationwide carelessly to ignore a defendant's fundamental right to a fair trial under the guise of expedience. It will further produce the feared result so vehemently condemned by this Court in Kotteakos:

> Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trials by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be inconvenient for prosecution. But our Government is not one of mere convenience or efficiency.

328 U.S. at 773, 66 S.Ct. at 1252. Here, as in Kotteakos, that toleration went too far.

Consequently, it is imperative that this Court exercise its supervisory power, pursuant to Rule 19(b), to restrain our lower courts from drifting toward the totalitarian institutions so inherently offensive to American jurisprudence. The issuance of a Writ of Certiorari in this case to the United States Court of Appeals for the Seventh Circuit is essential to accomplish this.

CONCLUSION

For the reasons stated, the Petitioner respectfully prays that this Honorable Court issue its Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Seventh Circuit.

David P. Schippers

Donald B. Mackay

Attorneys for Petitioner